



REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 233-4484

Members
James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**
ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

RUTH ANN CROW

v.

Docket No. 25-87-273-3

MARSHALL COUNTY BOARD OF EDUCATION

D E C I S I O N

Ruth Ann Crow, grievant, is employed by the Marshall County Board of Education as a teacher assigned to Union Junior High School. On September 8, 1987 she filed a grievance alleging the board violated school law pertaining to the filling of vacancies when she was not selected for a mathematics position at John Marshall High School. Grievant did not prevail at the lower grievance levels and a level four appeal was filed November 2, 1987; a hearing was conducted December 2, 1987 and briefs were filed December 15, 1987 and December 28, 1987 respectively.¹

¹The level two hearing was conducted October 6, 1987 and references thereto shall be cited (T.___).

Grievant has been certified to teach math and science for over ten years and taught at Union Junior High during that period except for her first year when she taught a split schedule between Union and John Marshall High School. Several years ago a school administrator approached grievant and asked if she would enroll in a graduate program leading to the gifted teaching endorsement. The inclusion of such a certified teacher on staff provides greater state revenue for the school system's use. Grievant testified that she considered the endeavor, but inquired of the administrator whether it would hurt her chances to get a full-time position at JMHS, a goal of hers since she taught there previously. She was told that adding the endorsement to her credentials would immediately render a service to the junior high school and the school system and enhance her qualifications for future opportunities and openings at JMHS. Prior to completing the requisite graduate work for the certification in December 1986, grievant assumed the duties of gifted coordinator at Union with a (temporary) teaching permit.

On August 3, 1987, grievant applied for a math opening at JMHS when a tenured teacher left the county late in the summer of 1987. During her interview with the school principal grievant learned that besides the vacancy created by the teacher who resigned, a newly created position was being filled. With respect

to the latter position, during the 1986-87 school year a math position had been filled and held by a substitute teacher; when grievant had inquired of it at the inception and at the completion of that school term, she was told the position was a temporary, one-year appointment. Subsequent to a school board meeting on August 24, 1987, grievant learned she had not been hired for either position.

Grievant contends that she was more senior than the two applicants who received the high school math positions but she received no letter stating why she had not been hired or suggestions for improvement as per W.Va. Code, 18A-4-8b.² Grievant argues that both her superior qualifications and seniority entitled her to one of the math vacancies at JMHS and asks that she be so instated.

²W.Va. Code, 18A-4-8b states in pertinent part:

A county board of education shall make decisions affecting promotion and filling of any classroom teacher's position occurring on the basis of qualifications. If the applicant with the most seniority is not selected for the position a written statement of reasons shall be given to the applicant with the most seniority with suggestions for improving the applicant's qualifications. (Emphasis added).

Throughout the record and at the level four hearing the school board did not deny that grievant was the most qualified and senior employee. However it claims the non-hiring of grievant was necessary as her departure from her present position at Union Junior High in late August would have left the school without a certified gifted teacher and a loss of revenue for the weighted gifted student enrollment.³

In his level four brief, counsel for the respondent board presented the following arguments on behalf of the board:

1) In the instant grievance the board's personnel actions should not be disturbed as it acted within its lawful discretion to employ whom it did and the law presumes the act was reasonable, fair and in good faith and the grievant has not proved otherwise.

2) The secondary administrator, Robert Eaton, determined grievant "not to be the most qualified for the position, within the meaning of West Virginia Code Section 18A-4-8b...." ⁴

³In his level four brief, counsel for the board stated that grievant's loss at UJHS would have cost the board \$60,000 of state aid to gifted pupils but no evidence had been submitted to document or support this calculation. The entire matter is speculative and begs the question as the board had no way of knowing whether or not another teacher at Union, or a prospective applicant for grievant's position, would have agreed to pursue a gifted degree as grievant herself had done at one time to render a service to the school system and enhance her own qualifications.

⁴This proposition is utterly erroneous as Mr. Eaton testified at both the level two and level four hearings that grievant was probably the most qualified. He stated at level four that excluding grievant, and of the "remainders," i.e., the five candidates other than grievant, the two persons who were hired were the most qualified for the positions.

3) The State Constitution mandates a "thorough and efficient" school system thus requiring that schools be carefully supervised to prevent waste and the deployment of grievant to JMHS would be wasteful as "the unfortunate timing which resulted in the vacancies at the high school" rendered it impossible and inefficient to find a replacement for grievant's important services at UJHS.⁵

In addition to the foregoing narration, the following findings of facts and conclusions of law are appropriate.

⁵ Absent from counsel's argument is any rationale for the board's lack of diligence in timely filling the second math position held by a substitute during 1986-87 as a "temporary" one-year position when student math enrollment figures for 1987-88 indicated a need for the position to become permanent. Had the board acted on this need in June 1987 instead of on August 24, 1987, there would have been ample time to select grievant, the most senior and qualified candidate, and to provide for her classes at UJHS, a task it would have to cope with anyway in the event of grievant's loss to the system through calamity or attrition. See also footnote 3, supra.

FINDINGS OF FACT

1. Grievant has been assigned to teach at Union Junior High School for the past eleven years; she is certified to teach math, science and gifted education. Grievant obtained the gifted teaching endorsement at the request of the secondary education administrator as the inclusion of a certified gifted teacher on a school's staff increases the adjusted enrollment count of identified gifted students and therefore provides greater state revenue.

2. When grievant agreed to pursue the certification, the Assistant Superintendent of Secondary Education, Robert Eaton, told her she would not harm her chances for advancement and, in fact, would enhance her opportunities and goals to secure a position at John Marshall High School. Prior to completing the requisites for certification in December 1986 grievant taught gifted math and science classes at UJHS on a temporary permit. No evidence was submitted by the board as to actual dollars generated to the county as a result of utilizing grievant's gifted certification at UJHS.

3. Grievant inquired of a math position at JMHS at the beginning and end of the 1986-87 school term. The position was taught by a substitute teacher and grievant was told the position was temporary and for one-year's duration. According

to Mr. Eaton, however, student math enrollment for the 1987-88 term indicated that the position needed to be filled permanently and apparently classes were scheduled for the position. According to Mr. Eaton's testimony that scheduling was not completed until July 26, 1987 (T.29).

4. In late July 1987 grievant learned that a math teacher at JMHS, Dr. Donald Niemeier, would be leaving the state and she formally applied for the position on August 3, 1987, the day the teacher tendered his resignation (T.10). The school board acted on the departing teacher's resignation August 11, 1987 and the position was posted from August 17 through August 21, 1987. The respondent advanced no rationale for its dilatory approach to the matter of both positions in light of the reopening of school quickly looming ahead.

5. Grievant was interviewed for the position (Dr. Niemeier's) for which she had applied and at that time learned that the "temporary" math position was also to be permanently filled at JMHS (the position of which she had previously inquired). Six applicants were interviewed for the two math positions. Mr. Eaton, the secondary education administrator, made the final determinations as to who would be recommended for employment for the two vacancies. Grievant learned that she had not been hired for either math position when she attended the board meeting on August 25 and two less senior individuals were hired for the positions in question.

6. At the time of grievant's non-selection, the board did not furnish her with a written statement of reasons and did not do so until she filed a grievance.

7. Written "reasons" furnished to grievant by Mr. Eaton on her level one grievance response stated that she could not be transferred to JMHS because of Dr. Niemeier's late resignation and it would have been impossible to reschedule JMHS students to take advantage of the gifted weighting (extra state funding) and, additionally, since none of the applicants for the JMHS position had math, science and gifted certifications, there would be no gifted program at UJHS.

8. The board did not and was utterly unable to furnish grievant with suggestions for improving her qualifications. In this instance and in light of the testimony of Mr. Eaton, the board acknowledged grievant's superior qualifications over other applicants for two math positions at JMHS.

9. For its defense in this grievance, the board focused on the difficulty of filling grievant's position should she be hired for Dr. Niemeier's position as he left at such an inopportune time. However, the board and school officials have advanced absolutely no justification or defense for failure to act on filling the second math position at JMHS (the position vacancy that had no bearing on Dr. Niemeier's departure) in a timely manner when student math enrollment data for 1987-88 indicated that the temporary math position occupied by a substitute for one year (1986-87) was to become a permanent position and those classes were not scheduled until July 26, 1987. (See, T.26 and 29).

10. School officials admitted that should grievant have been hired for one of the two positions at JMHS, the board would have several avenues to pursue to rectify her loss at UJHS, means that it would have to pursue should she depart by calamity or choice. For example, Mr. Eaton agreed that a substitute could have been hired for the JMHS position until grievant's UJHS position was filled and, along other lines, another applicant for the JMHS position who held math and science certifications could have been offered grievant's position and could then pursue the gifted endorsement for utilization at UJHS in the same manner as grievant had done.

11. Mr. Eaton testified that had grievant not held triple certification she would have been hired for the JMHS position and this stance was utterly contrary to the representations he made to her several years ago when he asked that she undergo the time and expense to obtain the gifted certification.

12. Grievant has proved by a preponderance of the evidence that school officials arbitrarily excluded her from consideration for one of two math positions at JMHS for which she held superior qualifications and seniority and the best interests of students and the school system is fulfilled when the most qualified person is hired for a vacant teaching position as a matter of law.

CONCLUSIONS OF LAW

1. County boards of education have substantial discretion in matters relating to the hiring, assignments, transfer and promotion of school personnel but this discretion must be exercised reasonably, in the best interest of the school system and in a manner which is not arbitrary or capricious. State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908 (W.Va. 1980); Miller v. McDowell County Board of Education, Docket No. 33-87-133-1.

2. W.Va. Code, 18A-4-8b provides that a county board of education shall make decisions affecting promotion and filling of any classroom teacher's position occurring on the basis of qualifications and in this instance school officials acknowledged grievant's superior qualifications for math positions she sought.

3. A county board of education must occasionally deal with the untimely departure of professional personnel and no existing laws or policy vitiates its responsibility to employ the most qualified applicant for the resultant vacancy.

4. A school board acting in a dilatory fashion filling known vacancies is estopped from defending its exclusion of the most qualified applicant for consideration on the basis of unfortunate timing, efficiency and economical considerations then presented because of its lack of diligence. In the instant grievance at least one position vacancy was identified when math enrollment data for 1987-88 indicated a need for additional staff.

5. A school board does not reasonably or fairly exercise its hiring discretion when it does not employ a teaching applicant, such as grievant herein, who had complied with an administration request that she expend time and effort pursuing certification to provide the school system greater revenues and to enhance her qualifications for career advancement to the very position(s) she was then denied.

6. The selection of applicants for two math positions over the more senioered and qualified grievant was arbitrary and contrary to W.Va. Code, 18A-4-8b. Scott v. Jackson County Board of Education, Docket No. 18-86-009-1; Yearego v. Jackson County Board of Education, Docket No. 18-87-031-1; Miller v. McDowell County Board of Education, supra, and Kilmer v. Wayne County Board of Education, Docket No. 50-86-324-1.

7. The presumption of good faith which is ordinarily accorded an official act cannot prevail and will not apply when a review of the facts warrant otherwise. Beverlin v. Board of Education of the County of Lewis, 216 S.E.2d 554 (W.Va. 1975); State ex rel. Linger v. Board of Education, 163 S.E.2d 790 (W.Va. 1968).

8. School personnel regulations and laws are to be strictly construed in favor of the employee. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979); Hedrick v. Pendleton County Board of Education, 332 S.E.2d 109 (W.Va. 1985); Warren v. Logan County Board of Education, Docket No. 23-86-375-1; Swain v. Berkeley County Board of Education, Docket No. 02-86-167-2.

9. Pursuant to W.Va. Code, 18-29-5(b) the West Virginia Education Employees Grievance Board is vested with the authority to provide relief not inconsistent with regulation or law and may instate grievants to a position to which he or she may be entitled. Phares v. Randolph County Board of Education, Docket No. 42-86-232-2; Brumfield v. Kanawha County Board of Education, Docket No. 20-86-126-1; Kilmer v. Wayne County Board of Education, supra.

Accordingly, the grievance is **GRANTED** and the board of education is ordered to instate grievant to a math teaching position at John Marshall High School.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the court.

DATED:

January 19, 1988

Nedra Koval

NEDRA KOVAL
Hearing Examiner